

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHAWNA K CUROW-RAY,
CHRISTOPHER D. RAY, and DONNA M.
RAY,

Plaintiffs,

v.

CITY OF TUMWATER, a code city,
municipality, OFFICER J. WEIKS, TPD,
AND "JANE DOE" WEIKS, husband and
wife and the marital community thereof,
OFFICER C. QUILES, TPD, "JANE DOE"
QUILES, and the marital community thereof,

Defendants.

CASE NO. C09-5633RJB

**ORDER ON DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

This matter comes before the Court on the Defendants' Motion for Summary Judgment (originally Dkt. 10, redacted and re-docketed as Dkt. 22). The Court has considered the motion, opposition to the motion, if any, and the file herein.

I. FACTS AND PROCEDURAL HISTORY

Originally filed in Thurston County, Washington Superior Court, Plaintiffs bring this case pursuant to federal law alleging that their rights were violated when their children and grandchildren were placed in protective custody. Dkt. 1. Plaintiffs also make state law claims. *Id.*

A. FACTS

Many of these facts appear in the case *Ray v. City of Lacey*, Western District of Washington case number 09-5636RJB, but are repeated here with citations to the record in this

1 case. Some of the events related below are relevant to this case alone.

2 Plaintiffs Christopher Ray and his wife, Shawna Curow-Ray married in April of 2007.
3 Dkt. 26, at 5. According to Ms. Curow-Ray, in February or March of 2007, they began to use
4 methamphetamine (“meth”). Dkt. 26, at 6. At first they used meth every two weeks, but by June
5 of 2007, it got to be an \$80.00 a day habit. Dkt. 26, at 6. The couple had a son together, T.R.
6 (age 6 at the time of these events), and Ms. Curow-Ray had a daughter from a previous
7 relationship, T.C. (age 11). Dkt. 26, at 5. Ms. Curow-Ray testified that, “I know that I wasn’t
8 the best mother during that period. I know that their needs got set aside for my addiction. I
9 don’t think I’ll ever fully know what I have completely done to my kids.” Dkt. 26, at 6. She
10 testified that due to their drug habit and “lifestyle” the children were left alone, and put
11 themselves to bed at night. Dkt. 26, at 7. Ms. Curow-Ray testified that by June of 2007, she and
12 Mr. Ray were having verbal arguments over money. Dkt. 26, at 7.

13 Ms. Curow-Ray testified that her memory at the time was “real fuzzy.” Dkt. 26, at 6.
14 She testified that on Friday, June 15, 2007, she and Mr. Ray were at a friend’s house. Dkt. 26, at
15 7. Ms. Curow-Ray testified that she would go on “two-or three- day binges” using meth, and
16 this was the second day of the binge. Dkt. 26, at 8. Mr. Ray states that he did not use drugs that
17 night. Dkt. 20, at 1. Mr. Ray left Ms. Curow-Ray at the friend’s house, without a way to get
18 home. Dkt. 26, at 7. Ms. Curow-Ray testified that she called a friend to come and get her, and
19 when she got home, (around 1:30 a.m. on the 16th), a big argument began between she and Mr.
20 Ray. Dkt. 26, at 8.

21 Ms. Curow-Ray testified that she left the house for several hours, and returned in the
22 morning. Dkt. 26, at 8. She states that when she returned home, there was a man in the garage
23 with Mr. Ray that she did not like. Dkt. 26, at 8. She stated that the man sometimes supplied
24 them with drugs. Dkt. 26, at 8. She stated that when she saw that man, she thought there was
25 going to be more drugs at their house. Dkt. 26, at 9. She testified that she wanted to get clean
26 and not continue down the path that they were on. Dkt. 26, at 9. She states that when she saw
27 that man in the garage with her husband, she got angry. Dkt. 26, at 9. Ms. Curow-Ray testified
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1 that she then went into the garage, began to yell at Mr. Ray and “got real aggressive” with him.
2 Dkt. 26, at 8. Ms. Curow-Ray testified that: “I remember yelling at him. I walked up to him,
3 pushed him, and then I swung and punched him in his eye. I continued to grab at him. I was
4 trying to knock him down.” Dkt. 26, at 9. She states that after she punched him in the eye, he
5 shoved her and she fell back a couple of steps. Dkt. 26, at 9. She states that she tripped on the
6 “step into the house and hit the doorjamb.” Dkt. 26, at 9. Ms. Curow-Ray testified that as a
7 result of hitting the doorjamb, she suffered an elevated collar bone and a “pretty good bruise” on
8 her left thigh. Dkt. 26, at 11.

9 In any event, they then entered the house, and Ms. Curow-Ray states that she went into a
10 bedroom with her daughter to calm down and tried to watch a movie. Dkt. 26, at 9-10. She
11 testified that Mr. Ray eventually came into the bedroom to retrieve the VCR or TV that they
12 were using, and they began to yell at each other again. Dkt. 26, at 9-10. Ms. Curow-Ray states
13 that although her memory is “real fuzzy” at this point, she thinks that they came out of the
14 bedroom yelling at each other. Dkt. 26, at 10. Ms. Curow-Ray testified that she didn’t know
15 how, but he ended up on top of her on the couch. Dkt. 26, at 10. Ms. Curow-Ray states that
16 while they were on the couch, her daughter jumped on Mr. Ray’s back and yelled, “get off my
17 mom!” Dkt. 26, at 10. Ms. Curow-Ray testified that she remembered Mr. Ray grabbing her
18 daughter and feeling scared. Dkt. 26, at 10. She testified that she thought “Oh gosh, now he’s
19 going to hurt her. But he let her go.” Dkt. 26, at 10.

20 T.C., the eleven year old daughter, testified that about a half an hour after the couch
21 incident, there was another conflict between her parents. Dkt. 26, at 39. She testified that she
22 didn’t know who pushed first, but that her mother “like was hit against the door or was pushed.
23 She tripped into the doorjamb thing.” Dkt. 26, at 39. She states that her mother hit her
24 shoulder. Dkt. 26, at 39.

25 Ms. Curow-Ray testified that after the couch incident, Mr. Ray’s mother, Donna Ray,
26 showed up. Dkt. 26, at 10. Ms. Curow-Ray states Mr. Ray and she continued to argue as Mr.
27 Ray was loading his car up with stuff. Dkt. 26, at 10. She states that she came at him again and
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1 he pushed her again to get her “out of his face.” Dkt. 26, at 10. At this point, Ms. Curow-Ray
2 called the police. Dkt. 26, at 10. City of Lacey police officers responded to the call and arrested
3 Mr. Ray as the primary aggressor in a domestic violence assault. The Lacey police officers are
4 not defendants in his action, but are defendants in a separate action filed by Mr. Ray. *Curow-*
5 *Ray v. City of Tumwater*, Western District of Washington case number 09-05636 RJB.

6 T.C. (age 11), testified that she spoke with the Lacey police officers. Dkt. 26, at 40. She
7 stated that she told them that she saw her parents yelling at each other and that they got into a
8 physical fight. Dkt. 26, at 40. T.C. testified that she told them that she pulled her dad off of her
9 mom. Dkt. 26, at 40. T.C. stated that she told the officers that her mom injured her shoulder
10 when she made contact with the doorjamb during the fight with her dad. Dkt. 26, at 40.

11 Ms. Curow-Ray testified after the Lacey police officers left with Mr. Ray, her father, Cal
12 Curow, who owned the house they were living in, told her he was evicting them. Dkt. 26, at 12.
13 Ms. Curow-Ray states that they discussed either Cal Curow or her brother, Dean Curow, taking
14 her daughter, T.C., for the summer. Dkt. 26, at 12. Ms. Curow-Ray testified that she was “fine”
15 with her daughter going to her brother’s for the summer. Dkt. 26, at 12. Ms. Curow-Ray
16 testified that she asked Mr. Ray’s mother, Donna Ray, to keep her son T.R. but not necessarily
17 for the whole summer. Dkt. 26, at 13.

18 Ms. Curow-Ray states that at Donna Ray’s urging she went to the hospital on Sunday,
19 June 17, 2007, regarding her shoulder. Dkt. 26, at 13. She states that she had an x-ray done, had
20 to wear a sling, and completed follow up visits because “they weren’t sure” if she needed
21 surgery. Dkt. 26, at 11.

22 Ms. Curow-Ray testified that on Monday, the 18th of June, she went to a Department
23 Social and Health Services (“DSHS”) office. Dkt. 26, at 13. The record does not state which
24 DSHS office. She states that she completed a mini drug evaluation and was being evaluated for
25 domestic violence counseling. Dkt. 26, at 13. Ms. Curow-Ray testified that she left that DSHS
26 office, called her brother, Dean, and told him that she wanted T.C. back. Dkt. 26, at 13. He told
27 her “no.” Dkt. 26, at 13. She states that around noon she then called her dad and told him her
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1 brother would not return T.C. Dkt. 26, at 13. She relates that her dad told her that he and Dean
2 were filing for temporary custody of T.C. at the Tumwater, Washington, DSHS office. Dkt. 26,
3 at 13. Ms. Curow-Ray states that she called the police from Donna Ray's house and drove to the
4 Tumwater DSHS office, around 15-20 minutes away. Dkt. 26, at 13-14.

5 Tumwater Officer Jon Weiks states that on June 18, 2007, he was dispatched to the
6 Tumwater DSHS office in response to a custodial interference call. Dkt. 25, at 1. He states that
7 he spoke with Dean Curow and his wife. Dkt. 25, at 2. Officer Weiks states that they told him
8 that they had been contacted by Cal Curow to assist with his sister's daughter as his sister had
9 been involved in a domestic violence incident, was high on meth, did not have a job, and was
10 about to be evicted. Dkt. 25, at 2. Officer Weiks states that he spoke with T.C. who stated that
11 she had witnessed the domestic violence incident, it was becoming more and more common, and
12 she was left alone several days a week from 8:00 p.m. to 10:00 p.m. Dkt. 25, at 2. Officer
13 Weiks stated that T.C. told him that she would occasionally go to bed without either parent there.
14 Dkt. 25, at 2.

15 Ms. Curow-Ray states that two City Tumwater police officers met her outside the
16 Tumwater DSHS office. Dkt. 26, at 13. Officer Quiles states that he waited outside for Ms.
17 Curow-Ray to arrive and stood by while Ms. Curow-Ray spoke with Officer Weiks. Dkt. 12, at
18 2. He states that he did not conduct any of the investigation. Dkt. 12, at 2. Ms. Curow-Ray
19 states that a Tumwater officer asked her how long she'd been clean, and she told him three days.
20 Dkt. 26, at 13. Ms. Curow-Ray states that she "explained the situation, what happened,
21 explained to them what [she] had been doing and what [she] was trying to do with the treatment
22 and stuff." Dkt. 26, at 13. Officer Weiks states that Ms. Curow-Ray had on a sling as a result of
23 an injury she attributed to the domestic violence incident. Dkt. 25, at 3. Ms. Curow-Ray states
24 that it "got a little ugly outside because they found out [she] was a drug addict." Dkt. 26, at 13.
25 Ms. Curow-Ray acknowledges that she told them that she was a meth addict, there had been a
26 domestic violence incident two days ago, and her husband was still in custody for that event.
27 Dkt. 26, at 14. Ms. Curow-Ray further told the Tumwater police officers that she had not
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1 entered treatment, was trying to enter treatment, and was “teetering” on the edge of using meth
2 again that day. Dkt. 26, at 15. Officer Weiks states that she also disclosed that she had a history
3 of drug use which resulted in losing custody of T.C. for nearly 2 and ½ years. Dkt. 25, at 3.

4 Ms. Curow-Ray testified that the officers told her that she “had to go upstairs [into the
5 DSHS office] and talk to one of the workers.” Dkt. 26, at 15. She testified that she “willingly”
6 went. Dkt. 26, at 15.

7 Ms. Curow-Ray testified that she and the Tumwater officers went into a DSHS office
8 with a long table. Dkt. 26, at 14. She testified that a DSHS worker, Rebecca Neal, came in and
9 explained what was “going on” and “that her kids were being placed into protective custody.”
10 Dkt. 26, at 15. Ms. Curow-Ray states that they kept asking her about T.R.’s location. Dkt. 26, at
11 15. Ms. Curow-Ray says that “she fought it” for about 40 minutes, but then was told that she
12 would be charged with endangering a minor if she did not produce T.R. Dkt. 26, at 15. She
13 testified that she felt “backed into a corner . . . it was either throw [her] kids into foster care or
14 send [her] kids with [her] brother.” Dkt. 26, at 16. (She acknowledges that her brother and his
15 wife were a good parents. Dkt. 26, at 16.) Ms. Curow-Ray testified that she felt that it was Ms.
16 Neal who was not giving her a choice. Dkt. 26, at 20. Ms. Curow-Ray states that she knew that
17 she was being accused of neglecting her kids based upon her daughter’s statements about being
18 left alone. Dkt. 26, at 16.

19 Ms. Curow-Ray states that she called Donna Ray and asked her to bring T.R. to her at the
20 DSHS office, and Donna refused. Dkt. 26, at 18. Tumwater Officer Weiks called Donna Ray
21 and told her that if she did not bring T.R. to them, she would be charged with a crime. Dkt. 26,
22 at 18, and 47. Donna Ray refused. Dkt. 26, at 48. Donna Ray states that she told Officer Weiks
23 that T.R. would be safe with her and that his parents had asked to keep him while they got their
24 lives “back on track.” Dkt. 16, at 1. Ms. Curow-Ray testified that she then called Donna Ray
25 back and told her that she had to bring T.R. to her at the DSHS office. Dkt. 26, at 18. Donna
26 Ray agreed at that point, and brought T.R. to the Tumwater DSHS office. Dkt. 26, at 18. Donna
27 Ray states that she “felt she had no choice in the matter, and that [she] had no freedom to remain
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1 at home with T.R. because of Officer Weiks' threat to arrest [her] and take T.R. from [her] by
2 force." Dkt. 16, at 2. Donna Ray testified that she tried to calm T.R. on the way to the DSHS
3 office. Dkt. 26, at 48. She testified that once they arrived all the people at the DSHS office were
4 rude. Dkt. 26, at 48. She testified that one of the Tumwater police officers "like snatched" T.R.
5 from her and told her that he was taking T.R. to his sister. Dkt. 26, at 48. Donna Ray states that
6 the officer refused to let her talk with Ms. Curow-Ray. Dkt. 16, at 2. Donna Ray stated that she
7 was never held against her will by a Tumwater police officer. Dkt. 26, at 51.

8 Officer Weiks states that he confirmed the domestic violence incident with the Lacey
9 police department. Dkt. 25, at 3. He states that as a result of all the circumstances, he decided to
10 place both children in protective custody and immediately turned the children over to DSHS.
11 Dkt. 25, at 3.

12 Ms. Curow-Ray signed Voluntary Placement Agreements placing both T.C. and T.R.
13 with her brother Dean Curow from June 18, 2007, to July 30, 2007. Dkt. 26, at 17. Mr. Ray also
14 signed the Voluntary Placement Agreements. Dkt. 26, at 34. The Voluntary Placement
15 Agreements were not extended beyond July 30, 2007. Dkt. 26, at 17. Ms. Curow-Ray testified
16 that the Tumwater police officers were in the room during her conversation with Ms. Neal
17 regarding the Voluntary Placement Agreements, but she "kept telling them to shut up and quit
18 talking." Dkt. 26, at 20. Although she states that she was in a locked room, she did not ask to
19 leave prior to signing the Voluntary Placement Agreements, and stated that she was "not leaving
20 that office without her kids." Dkt. 26, at 20.

21 Mr. Ray was arraigned in Thurston County Washington, District Court in the afternoon
22 of July 18, 2007. Dkt. 26, at 24. Upon reviewing the statement of probable cause, the court
23 initially found that there was probable cause for Mr. Ray's arrest. Dkt. 26, at 26. After hearing
24 that the prosecutor was unsure whether charges would also be filed against Ms. Curow-Ray, the
25 following exchange took place:

26 The Court: Well, I will tell you this, I mean, maybe I should just not find
27 probable cause until you decide what you are going to do then . . . Because it's
28 unequal justice, in my opinion. I'm just not going to find probable cause at this
point in time.

Prosecutor: Well, okay.

The Court: So you get to decide . . .

Prosecutor: Well - -

The Court: I'm not - - I'm sick and tired of - - -

Prosecutor: I understand the issue, with all due respect. But I'm not - -

The Court: Well, then both parties need to be charged or neither party needs to be charged.

Prosecutor: Well. . .

The Court: So right now I'm going to not find probable cause and you are released on PR. If you go back there, Mr. Ray, you're probably going to be ended up with not only this case, which I will allow the city to refile because I'm dismissing it without prejudice at this point, but you are going to have another charge as well.. .

Dkt. 26, at 28-29.

After Mr. Ray was arraigned, Donna Ray returned to the couples' home to retrieve a cell phone. Dkt. 26, at 19. Ms. Curow-Ray testified that Donna Ray was upset over T.R. being taken. Dkt. 26, at 19. Ms. Curow-Ray stated that she didn't want to fight with Donna Ray and so walked away and "a bottle of perfume in a box got broke." Dkt. 13, at 19. Ms. Curow-Ray states that she then called the police "just to have them return the cell phone to her and that's when she ended up getting arrested for domestic violence." Dkt. 13, at 19. After Donna Ray's arrest, there was a no contact order in place between Donna Ray and Ms. Curow-Ray for a year and a half. Dkt. 26, at 19. Donna Ray states that she did not have contact with Ms. Curow-Ray until the order expired. Dkt. 26, at 50. Donna Ray acknowledges that she did not contact Ms. Curow-Ray to see the children during that time. Dkt. 26, at 50. Donna Ray acknowledges that she has never had legal custody of either of the children, nor has she been their legal guardian. Dkt. 26, at 51.

Ms. Curow-Ray testified that near the end of July 2007, the children were returned. Dkt. 26, at 18. Ms. Curow-Ray states that while her brother Dean Curow had the children, he allowed her to visit them. Dkt. 26, at 18. Mr. Ray testified that he could not remember how long the children were gone, but that he only got to visit them three times. Dkt. 26, at 34.

Mr. Ray testified that he could not recall any contact with any one from the Tumwater Police Department. Dkt. 26, at 35. He states that when he was released from jail, he was "shocked" to discover that the children had been taken from his wife's custody. Dkt. 17, at 1.

1 He asserts that they were “not perfect parents, but [they] always took care of the children,
2 making sure that they were safe and secure.” Dkt. 17, at 1. Donna Ray states that she felt she
3 was a competent grandmother, and T.R. should have been left with her rather than taken into
4 protective custody. Dkt. 16, at 2. Ms. Curow-Ray states that she realized that she had a drug
5 problem, but was making every effort to keep her children “shielded from it and safe.” Dkt. 15,
6 at 3.

7 **B. PROCEDURAL HISTORY**

8 Plaintiffs’ Complaint makes a federal claims for: 1) the violation of “the well established
9 right of family unity” under the heading 42 U.S.C. § 1983, and 2) the Defendants’ conspiracy to
10 interfere with the Plaintiffs’ civil rights under 42 U.S.C. § 1985 (1), (2), and (3). Dkt. 1.

11 Plaintiffs’ Complaint makes state law claims for: 1) the false imprisonment of Ms. Curow-Ray
12 and Donna Ray against the individual officers, 2) outrage, 3) negligent training/supervision
13 against the City of Tumwater, 4) negligent hiring and retention against the City of Tumwater,
14 and 5) interference with family relations. *Id.* Plaintiffs seek damages, attorneys’ fees and costs.

15 *Id.* Plaintiff Christopher Ray filed an additional case, alleging that the City of Lacey and
16 individually named Lacey police officers “deprived him of his fundamental right to his
17 children’s companionship,” have violated his civil rights, and references 42 U.S.C. § 1983. *Ray*
18 *v. City of Lacey, et.al.*, Western District of Washington case number 09-5636RJB, Dkt. 1-3, at
19 10. In that case, Plaintiff Ray brings “claims against the Defendants . . . for their conspiracy to
20 interfere with civil rights in obstructing justice to Plaintiff, and by intimidation or threat to the
21 Plaintiff, and depriving the Plaintiff of rights and privileges pursuant to 42 U.S.C. § 1985 (1),
22 (2), and (3).” *Ray v. City of Lacey, et.al.*, Western District of Washington case number 09-
23 5636RJB, Dkt. 1-3, at 10-11. Plaintiff alleges a claim of negligent hiring and retention against
24 Defendant City of Lacey. *Ray v. City of Lacey, et.al.*, Western District of Washington case
25 number 09-5636RJB, Dkt. 1-3, at 10. In that case, Plaintiff Ray also asserts state law claims for
26 false imprisonment and arrest, negligent training and supervision, outrage, and interference with
27 family relations. *Ray v. City of Lacey, et.al.*, Western District of Washington case number 09-
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1 5636RJB, Dkt. 1-3, at 8-10.

2 **C. PENDING MOTION**

3 On June 25, 2010, Defendants filed a Summary Judgment Motion, seeking dismissal of
4 all Plaintiff's claims. Dkt. 22 (originally filed as Dkt. 10 refiled as Dkt. 22 in redacted form).
5 As to the federal claims, Defendants argue that: 1) they are entitled to qualified immunity as to
6 the claims brought pursuant to 42 U.S.C. § 1983, 2) there is no basis for liability under 42 U.S.C.
7 § 1985, and 3) there is no basis for municipal liability under *Monell v. N.Y. City of Dept. of Soc.*
8 *Services*, 436 U.S. 658, 694 (1978). Dkts. 22 and 20.

9 Defendants argue that the state law claims should be dismissed because: 1) there is no
10 evidence that the named Defendants arrested or imprisoned any of the Plaintiffs, 2) there is no
11 evidence to support a claim for outrage, 3) Plaintiffs' claims against the City of Tumwater for
12 negligent training and supervision are precluded by the public duty doctrine, 4) there is no
13 evidence to support a claim for negligent training or supervision, and 5) the evidence does not
14 support a claim for interference with family relations. Dkts. 22 and 20.

15 Plaintiffs respond, and argue that: 1) the individual Defendant officers violated their
16 clearly established constitutional right to the care, custody, and control of their children and so
17 are not entitled to qualified immunity, 2) that Defendants are liable for conspiring to interfere
18 with the Plaintiffs' right to the care, custody and control of their children under 42 U.S.C. §
19 1985, and 3) they are not asserting a claim under 42 U.S.C. § 1983 for municipal liability. Dkt.
20 14.

21 As to the state law claims, Plaintiffs argue that the Defendant officers violated RCW
22 26.44.050 because there was not probable cause to believe the children were abused or
23 neglected, would be injured or could not be taken into custody if a court order had to be acquired
24 first. Dkt. 14. Plaintiffs further argue that: 1) the claim for false arrest as to Donna Ray and Ms.
25 Curow-Ray should not be dismissed, 2) there is evidence to support their claim for outrage, 3)
26 the public duty doctrine does not preclude a claim for negligent hiring, retention, training or
27 supervision, 4) there is sufficient evidence of negligent supervision because the officers took the
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1 children contrary to the statute, and 5) there is evidence of interference with family relations.

2 Dkt. 14.

3 **II. DISCUSSION**

4 **A. SUMMARY JUDGMENT - STANDARD**

5 Summary judgment is proper only if the pleadings, depositions, answers to
6 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
7 genuine issue as to any material fact and the moving party is entitled to judgment as a matter of
8 law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the
9 nonmoving party fails to make a sufficient showing on an essential element of a claim in the case
10 on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
11 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could
12 not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v.*
13 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific,
14 significant probative evidence, not simply “some metaphysical doubt.”); *See also* Fed. R. Civ. P.
15 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence
16 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions
17 of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v.*
18 *Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

19 The determination of the existence of a material fact is often a close question. The court
20 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
21 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*
22 *Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of
23 the nonmoving party only when the facts specifically attested by that party contradict facts
24 specifically attested by the moving party. The nonmoving party may not merely state that it will
25 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
26 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).

27 Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be

presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. FEDERAL CLAIMS AND QUALIFIED IMMUNITY

“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “Through application of the qualified immunity doctrine, public servants avoid the general costs of subjecting officials to the costs of trial - distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *V-I Oil Co. v. Smith*, 114 F.3d 854, 857 (9th Cir. 1997)(*internal citations omitted*). The immunity is “immunity from suit rather than a mere defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The Supreme Court established a two-part analysis in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), for determining whether qualified immunity is appropriate in a suit against a public official for an alleged violation of a constitutional right. *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir. 2004), citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Although no longer mandatory, the Supreme Court has recently held that it may be “beneficial” for a court required to rule upon qualified immunity to examine the *Saucier* factors: (1) whether the official violated the plaintiff's constitutional rights on the facts alleged and (2) if there was a violation, whether the constitutional rights were clearly established. *Pearson v. Callahan*, 129 S.Ct. 808, (2009) (holding that the *Saucier* two-part analysis was no longer mandatory).

Application of the factors is beneficial here, so this opinion will first turn to whether Plaintiffs' substantive due process rights were violated, if so whether those rights were clearly established, and then whether there is some basis to hold the individual defendants liable under § 1985.

1. Substantive Due Process Right to Family Unity

a. *Violation?*

The Substantive Due Process Clause of the Fourteenth Amendment to the U.S.

1 Constitution protects the fundamental right of parents to make decisions concerning the care,
2 custody, and control of their children. *Troxel v. Grandville*, 530 U.S. 57, 64 (2000).

3 i. Officer Quiles

4 Plaintiffs point to no evidence that Officer Quiles was in any manner involved in the
5 decision to place the children into protective custody. Their substantive due process claim as to
6 him should be dismissed.

7 ii. Officer Weeks

8 Plaintiffs' claim for violation of their right to family unity in part depends on Plaintiffs'
9 individual circumstances. Officer Weeks' decision to place the children into temporary
10 protective custody will be examined regarding the rights and circumstances of each of the
11 Plaintiffs.

12 As to Donna Ray, the Ninth Circuit has held that non-custodial grandparents do not have
13 a constitutionally protected liberty interest in the care, custody and control of their
14 grandchildren. *Miller v. California*, 355 F.3d 1172, 1175 (9th Cir. 2004). Donna Ray
15 acknowledged that she was not the legal guardian and did not have legal custody of either of her
16 grandchildren. She stated that T.R. often spent the night and she baby sat him. She, like the
17 grandparents in *Miller* who cared for their grandchildren for a substantial period of time, often
18 cared for T.R. but did not have custody of him. Donna Ray does not have a protected
19 constitutional interest in family unity with her grandchildren, and accordingly, her constitutional
20 claim should be dismissed. *Miller*, at 1176.

21 While a parent's constitutional liberty interest in the maintenance of the familial
22 relationship exists, this right is not absolute. *Woodrum v. Woodward County*, 866 F.2d 1121,
23 1125 (9th Cir 1989). The interest of the parents must be balanced against the interests of the
24 state in protecting the child. *Id.* The Fourteenth Amendment, then, "guarantees that parents will
25 not be separated from their children without due process of law except in emergencies." *Mabe v.*
26 *San Bernadino Co. Dept. of Public Social Services*, 237 F.3d 1101, 1107 (9th Cir. 2001).
27 "Officials may remove a child from the custody of its parent without prior judicial authorization
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1 only if the information they possess at the time of the seizure is such as provides reasonable
2 cause to believe that the child is in imminent danger of serious bodily injury and that the scope
3 of the intrusion is reasonably necessary to avert that specific injury.” *Wallis v. Spencer*, 202
4 F.3d 1126, 1138 (9th Cir. 2000). Generally, these are jury questions, and summary judgment in
5 favor of the defendant is only proper where, viewing the evidence in a light most favorable to
6 plaintiff, it is clear that no reasonable jury could conclude that the plaintiff’s constitutional rights
7 were violated. *Id.*

8 Mr. Ray’s claim for violation of his substantive due process rights to family unity should
9 be dismissed. Mr. Ray was incarcerated for a domestic violence assault at the time the decision
10 to place the children in temporary protective custody was made. There is no evidence that Mr.
11 Ray did not voluntarily sign the forms giving temporary custody of the children to Dean Curow
12 and his wife. His claim should be dismissed.

13 Ms. Curow-Ray’s claim for a violation of her substantive due process rights against
14 Officer Weiks for his decision to put the children into protective custody should also be
15 dismissed. Officer Weiks had ample information, at the time the decision was made, justifying
16 placement of the children in protective custody. That information provided reasonable cause to
17 believe that the children were in imminent danger of serious bodily injury and that the scope of
18 his intrusion was reasonably necessary to avert that specific injury. *Wallis*, at 1138.

19 First, Officer Weiks had probable cause to believe that the children were in “imminent
20 danger of serious bodily harm.” *Wallis*, at 1138. Mr. Ray was in custody for assaulting Ms.
21 Curow-Ray at the time. Officer Weiks observed Ms. Curow-Ray wearing a sling, and she told
22 him that her injury was a result of the fight with Mr. Ray. Officer Weiks was aware that Mr. Ray
23 was in jail and it was unclear when he would be released from custody. Both children told
24 Officer Weiks that their parents had been fighting a lot lately. T.C. informed Officer Weiks that
25 she witnessed the physical fight between her parents which lead to Mr. Ray’s arrest, and that
26 these incidents were becoming more and more frequent. T.C. was, in fact, involved in the
27 physical altercation with her parents, but it is unclear from the record whether Officer Weiks
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1 knew that or not. T.C. informed Officer Weiks that she and her brother were left home alone
2 frequently until 10:00 p.m., and they sometimes put themselves to bed without their parents
3 being home. A victims's report of abuse, and in this case, neglect, is compelling evidence.
4 *Burke v. County of Alameda*, 586 F.3d 725, 731 (9th Cir. 2009). Further, Ms. Curow-Ray
5 acknowledged to Officer Weiks that she was a drug addict, and that she had already lost custody
6 of T.C. for two and ½ years prior to this time due to her drug addiction. Ms. Curow-Ray
7 acknowledged to him that she had used meth a few days before and was "teetering" on the edge
8 of using meth again that day. She indicated that she used more when under stress. She told him
9 that she was going to be evicted. Although she claimed she was going to seek treatment, she was
10 not in treatment for her addiction at that point. Officer Weiks was aware that Ms. Curow-Ray
11 had decided on Saturday that T.C. should live with Dean Curow for the summer while she got
12 her life back together, but then changed her mind and wanted T.C. back immediately. Officer
13 Weiks was aware that T.C. did not want to return to her mother's care. Officer Weiks was
14 present during the conversation between Ms. Curow-Ray and Donna Ray regarding T.R. and
15 knew that they were disagreeing about whether Donna Ray had to bring T.R. to his mother.
16 When faced with a mother who indicates that she is teetering on the verge of using meth, used
17 meth a few days before, has been in a physical fight a few days before with her husband (which
18 involved her daughter), was facing eviction, and was driving, no jury would conclude that
19 Officer Weiks did not have a reasonable belief that the children were "in imminent danger of
20 serious bodily injury."

21 Plaintiffs argue that there is no evidence in the record that the children were physically
22 harmed before. The undisputed testimony was that the children's parents were using meth daily
23 and that the children were left alone for long periods. The fact that the children were not hurt
24 before appears to be a matter of luck. Common sense tells us that the children were at
25 substantial risk of harm.

26 On the question of imminence of harm, an officer must have "reasonable cause to believe
27 that harm will occur in the period of time it would take to procure a warrant and remove the
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1 child from the home” in order to take a child into protective custody without a warrant. *Burke*, at
2 731-732. Officer Weiks was aware that Ms. Curow-Ray was being evicted. It was reasonable
3 for him to conclude that he would not have a valid address to find the children, particularly if
4 Ms. Curow-Ray made the decision to use meth again that day, if he waited for a court order.
5 Officer Weiks had reasonable cause to believe that harm will occur in the period of time it would
6 take to procure a warrant and remove the children from the home.

7 Lastly, the scope of the intrusion and degree of Officer Weiks’ interference was
8 reasonably necessary. *Burke*, at 731. Officer Weiks did not make any placement decisions. He
9 took the children into protective custody and immediately turned the children over to DSHS to
10 determine appropriate living arrangements for them. Ms. Curow-Ray testified that it was the
11 DSHS workers who she felt gave her the choice only of whether she could place the children
12 into foster care or with her brother, Dean Curow. Within a very short time after Officer Weiks
13 placed the children into protective custody, Ms. Curow-Ray signed voluntary placement
14 agreements for the children. (The DSHS workers are not defendants here.) The scope of Officer
15 Weiks’ intrusion and degree of interference was reasonably necessary.

16 To the extent that Plaintiffs attempt to base their claim on a violation of state law, Officer
17 Weiks certainly had probable cause to believe that his actions were appropriate under the state
18 law standard, RCW 26.44.050, which provides:

19 A law enforcement officer may take, or cause to be taken, a child into custody
20 without a court order if there is probable cause to believe that the child is abused
21 or neglected and that the child would be injured or could not be taken into
custody if it were necessary to first obtain a court order pursuant to RCW
13.34.050.

22 The undisputed evidence is that the children were left alone frequently, and so were neglected.
23 Under the state statute, then, he either had to have probable cause that the children “would be
24 injured” or “could not be taken into custody if it were necessary to first obtain a court order.” As
25 above, the evidence in the record establishes that Officer Weiks had probable cause, that is a
26 reasonable belief that the children would be injured, in light of the fact that he was aware there
27 was violence in the home, the only parent not in custody was “teetering” on the verge of using
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1 meth, was being evicted, and was driving a car. He also had probable cause to believe that the
2 children could not be taken into custody if he waited to try and get a court order because he
3 knew that they were being evicted, and had no idea where he might find them if he let them go.
4 Under the circumstances, the Washington state statute also authorized Officer Weiks' decision to
5 take the children into protective custody.

6 a. *Clearly Established?*

7 Even if Officer Weiks' decision to place the children in protective custody did violate the
8 Plaintiffs' substantive due process right to family unity, that right was not clearly established in
9 the circumstances alleged, and he is entitled to qualified immunity. The inquiry is whether under
10 the circumstances, a reasonable officer would have had fair notice that the decision was
11 unlawful, and whether any mistake to the contrary would have been unreasonable. *See*
12 *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003).

13 A reasonable officer would not have fair notice that in these circumstances the decision
14 to take the children into protective custody was unlawful. Under the Ninth Circuit precedent,
15 children must be in "imminent danger of serious bodily injury," *Wallis*, at 1138, for a police
16 officer to remove them from their parents care without a warrant. As above, the evidence in the
17 record supports the conclusion that the children here were in "imminent danger of serious bodily
18 injury." Even if they were not, a mistake to the contrary, made on the side of protecting the
19 children, was reasonable.

20 Furthermore, the undisputed evidence in the record supports Officer Weiks' decision as
21 authorized under RCW 26.44.050. Officer Weiks was placed in the position, in the middle of all
22 this chaos, to make a decision as to whether to place these children into protective custody on the
23 belief that they were either in "imminent danger of serious bodily injury," *Wallis*, at 1138, under
24 federal law, or to place them into protective custody on the belief that they "would be injured or
25 could not be taken into custody if it were necessary to first obtain a court order," RCW
26 26.44.050, under state law. It is these sorts of untenable situations in which qualified immunity
27 is warranted. Qualified immunity should be granted and the claim for violation of the
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1 substantive due process right to family unity should be dismissed.

2 2. Federal Constitutional Conspiracy Claim Pursuant to 42 U.S.C. § 1985

3 Plaintiffs' Complaint asserts claims under 42 U.S.C. § 1985(1), (2) and (3). Dkt. 1.
4 Each claim will be considered in turn.

5 Plaintiffs are not federal officers, so 42 U.S.C. § 1985(1) does not apply. *Canlis v. San*
6 *Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 717 (9th Cir.1981). Plaintiffs were not parties
7 or witnesses in a federal proceeding at the time, and so 42 U.S.C. § 1985(2) does not apply.
8 *Portman v. County of Santa Clara*, 995 F.2d 898, 909 (9th Cir.1993).

9 Under 42 U.S.C. § 1985(3) - the Ku Klux Klan Act of 1871- individuals are protected
10 from conspiracies to deprive them of their legally protected rights. *Sever v. Alaska Pulp Corp.*,
11 978 F.2d 1529, 1536 (9th Cir. 1992). To bring a claim successfully under section 1985(3), a
12 plaintiff must allege and prove four elements:

13 (1) conspiracy, (2) for the purpose of depriving, either directly or indirectly, any
14 person or class of persons of the equal protection of the laws, or of equal
15 privileges and immunities under the laws, and (3) an act in furtherance of the
16 conspiracy; (4) whereby a person is either injured in his person or property or
17 deprived of any right or privilege of a citizen of the United States.

18 *Id.* (internal citations omitted). "Further, the second of these four elements requires that in
19 addition to identifying a legally protected right, a plaintiff must demonstrate a deprivation of that
20 right motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory
21 animus behind the conspirators' action." *Id.*

22 Plaintiffs point to no evidence in the record that Defendants were motivated by racial or
23 other class-based "invidiously discriminatory animus." To the extent that Plaintiffs bring a
24 conspiracy claim under 42 U.S.C. § 1985(3), it should be dismissed.

25 It is, however, "permissible to state a civil cause of action of conspiracy, based on §
26 1983." *Cohn v. Norris*, 300 F.2d 24 (9th Cir. 1962). A civil conspiracy is 1) a combination of
27 two or more persons, 2) who, by some concerted action, intend to accomplish some unlawful
28 objective, 3) for the purpose of harming another, 4) which results in damage. *Vieux v. East Bay*
Ridge Park Dist., 906 F.2d 1330, 1343 (9th Cir. 1990)(internal citations omitted). "In order to

1 prove a civil conspiracy, the parties, to have conspired, must have reached a unity of purpose or
2 a common design and understanding, or a meeting of the minds in an unlawful arrangement.” *Id.*

3
4 To the extent their claim is brought pursuant to section 1983, the Defendants’ motion to
5 summarily dismiss Plaintiffs’ claim for a civil conspiracy to violate their constitutional rights
6 should be granted. Plaintiffs have failed to point to any evidence in the record which shows that
7 Defendants engaged in a concerted action intended to deny them of their constitutional rights.
8 There is no evidence that the Defendants reached a “unity of purpose.” Plaintiffs’ federal
9 conspiracy claim should be dismissed.

10 **E. STATE LAW CLAIMS**

11 1. False Arrest and Imprisonment

12 Under Washington law, false arrest or false imprisonment is the unlawful violation of a
13 person's right of liberty or the restraint of that person without legal authority. *Bender v. City of*
14 *Seattle*, 99 Wn.2d 582, 590-91 (1983).

15 A person is restrained or imprisoned when he is deprived of either liberty of
16 movement or freedom to remain in the place of his lawful choice; and such
17 restraint or imprisonment may be accomplished by physical force alone, or by
18 threat of force, or by conduct reasonably implying that force will be used. One
19 acting under the apparent authority-or color of authority as it is sometimes
20 described-or ostensibly having and claiming to have the authority and powers of a
21 police officer, acts under promise of force in making an arrest and effecting an
22 imprisonment.

23 *Id.* (internal citations omitted).

24 Plaintiffs’ claim for the false arrest and/or false imprisonment should be dismissed. Mr.
25 Ray does not make this claim as to these Defendants. Ms. Curow-Ray failed to point to any
26 evidence in the record which supports her claim for false arrest or imprisonment. Ms. Curow-
27 Ray makes no showing that her right of liberty was restrained by these defendants. Ms.
28 Curow-Ray testified after speaking with her outside the Tumwater DSHS office, the officers told
her that she “had to go upstairs [into the DSHS office] and talk to one of the workers.” Dkt. 26,
at 15. She testified that she “willingly” went. Dkt. 26, at 15. Ms. Curow-Ray states that she
was in a locked room at the DSHS office. Dkt. 26, at 20. She testified however, that she did not

1 ask to leave prior to signing the Voluntary Placement Agreements, and was “not leaving that
2 office without her kids.” Dkt. 26, at 20. She makes no showing that she was deprived of her
3 liberty in any manner or was in any manner restrained. Her claim should be dismissed.

4 Donna Ray argues that when Officer Weiks told her that she had to bring T.R. to the
5 Tumwater DSHS office, her right to remain in the place of her lawful choice was infringed upon.
6 Dkt. 14. Donna Ray submitted a declaration stating that she felt she had to bring him as a result
7 of Officer Weiks’ threat to arrest her if she did not. Dkt. 16. She testified, however, that when
8 Officer Weiks told her to bring T.R. to them, she told him “no.” Donna Ray testified that she
9 only agreed to bring T.R. after Ms. Curow-Ray asked her to do so. Ms. Curow-Ray’s testimony
10 is also consistent with this account. Donna Ray should not be permitted to create an issue of fact
11 by contradicting her own deposition testimony. *Radobenko v. Automated Equipment Corp.*, 520
12 F.2d 540 (9th Cir. 1975). Donna Ray stated further that she was never held against her will by a
13 Tumwater police officer. Dkt. 26, at 51. Her claim for false arrest and or imprisonment should
14 be dismissed as well.

15 2. Outrage

16 In order to maintain a claim for outrage, a plaintiff must show “(1) extreme and
17 outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual
18 result to the plaintiff of severe emotional distress.” *Birkliid v. Boeing Co.*, 127 Wash.2d 853, 867
19 (1995)(*internal citations omitted*). The conduct in question must be “so outrageous in character,
20 and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
21 atrocious, and utterly intolerable in a civilized community.” *Id.* Although whether conduct is
22 sufficiently outrageous is ordinarily a question for the jury, the trial court must decide as a
23 threshold matter, whether reasonable minds could differ about whether the conduct was so
24 extreme as to result in liability. *Dicomes v. State*, 113 Wash.2d 612, 630 (1989).

25 Plaintiffs fail to meet the threshold question. That is reasonable minds could not differ
26 about whether the officers’ decision to place the children in protective custody “was so extreme
27 as to result in liability,” *Dicomes*, at 630. It was not. Plaintiffs fail to point to any evidence from
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1 which a jury could conclude that the decision to take the children into protective custody was
 2 conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible
 3 bounds of decency. . . .” *Birkliid*, at 867, in the circumstance. The officers were faced with a
 4 situation in which the children’s father was in custody for assaulting their mother. Their mother,
 5 an acknowledged meth addict, told the officers she was teetering on the verge of using meth
 6 again, had already lost custody of T.C. due to her addiction, and was insisting on getting her
 7 children back immediately. Donna Ray complains that the officers were rude to her when she
 8 arrived with T.R. She makes no showing that unpleasantness alone is sufficient under
 9 Washington law to constitute a claim for outrage. This claim should be dismissed.

10 3. Interference with Family Relations

11 In Washington, a claim of malicious interference with a family relationship requires
 12 Plaintiff to show five elements:

13 1) an existing family relationship; 2) malicious interference with the relationship
 14 by a third person; 3) an intention on the part of the third person that such
 15 malicious interference results in a loss of affection or family association; 4) a
 causal connection between the third parties' conduct and the loss of affection; and
 5) resulting damages.

16 *Babcock v. State*, 112 Wash.2d 83, 107-08 (1989) (*internal citations omitted*).

17 Plaintiffs’ claim for interference with family relationships should be dismissed. Plaintiffs
 18 make no showing as to the second or third element. There is no showing that the officers here
 19 maliciously acted to interfere with Plaintiffs’ relationship with their family. “Malicious
 20 interference” refers to unjustifiable interference. *Babcock* at 108. While Officer Weiks placed
 21 the children in temporary protective custody, there is insufficient evidence to prove that such
 22 interference was “unjustifiable.” There is ample evidence that such interference was, in fact,
 23 justifiable. There is no evidence that the Defendants intended for Plaintiffs to suffer a “loss of
 24 affection.” Defendants’ motion to summarily dismiss this claim should be granted.

25 4. Negligent Hiring, Retention, Training, and Supervision

26 In Washington, to establish a prima facie case of negligence, a plaintiff must show a
 27 duty, breach, proximate cause, and a resulting injury. *Hoffer v. State*, 110 Wash.2d 415,421
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1 (1988).

2 Plaintiffs make claims for negligent hiring, retention, training and supervision against the
3 City of Tumwater. Dkt. 1. Plaintiffs' claims should be dismissed. Plaintiffs do not
4 meaningfully oppose the motion regarding their negligent hiring, retention, and training claims.

5 Plaintiffs argue that, as to their negligent supervision claim, the officers did not follow
6 RCW 26.44.050 or the constitution when they decided to place the children in temporary
7 protective custody. Dkt. 14, at 12. RCW 26.44.050 provides:

8 A law enforcement officer may take, or cause to be taken, a child into custody
9 without a court order if there is probable cause to believe that the child is abused
10 or neglected and that the child would be injured or could not be taken into
custody if it were necessary to first obtain a court order pursuant to RCW
13.34.050.

11 Plaintiffs argue that if they had been properly supervised, Tumwater would have realized that
12 the officers were exceeding their authority. Dkt. 14, at 12. Plaintiff's position is without merit.
13 Plaintiff makes no showing that the officers here "were acting outside the scope of employment,"
14 *Niece v. Elmview Group Home*, 131 Wash.2d 39, 48 (1997) when they decided to take the
15 children into protective custody. Plaintiffs do not provide any evidence on the standard of care
16 for the supervision of police officers. *Gurno v. Town of LaConner*, 65 Wash.App. 218, 228-29
17 (1992). Plaintiff provided no evidence that there was a breach of any standards. Plaintiff made
18 no showing that a breach of a standard of care proximately caused their alleged false arrest,
19 interference with family relationships, or any other injury. Defendants' motion to summarily
20 dismiss Plaintiff's claims for negligent hiring, retention, training, and supervision should be
21 granted.

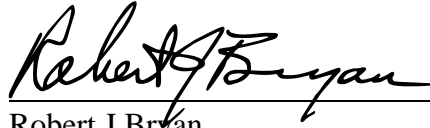
22 **III. ORDER**

23 Therefore, it is hereby, **ORDERED** that:

- 24 • Defendants' Motion for Summary Judgment (originally Dkt. 10, refiled as Dkt. 22) is
25 **GRANTED;**
- 26 • Plaintiffs' claims against all Defendants are **DISMISSED;**
- 27 • This case is **DISMISSED.**

1 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
2 of record and to any party appearing *pro se* at said party's last known address.

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4 DATED this 12th day of August, 2010.

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7 Robert J Bryan
8 United States District Judge
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